

In the Matter of	)	MB Docket No. 14-82
	)	
<b>PATRICK SULLIVAN</b>	)	FRN 0003749041, 0006119796,
(Assignor)	)	0006149843, 0017196064
	)	
and	)	Facility ID No. 146162
	)	
<b>LAKE BROADCASTING, INC.</b>	)	File No. BALFT-20120523ABY
(Assignee)	)	
	)	
Application for Consent to Assignment of	)	
License of FM Translator Station W238CE,	)	
Montgomery, Alabama	)	

To: Marlene H. Dortch, Secretary  
 Attn: Chief Administrative Law Judge Richard L. Sippel

**ENFORCEMENT BUREAU RESPONSE TO  
 LAKE BROADCASTING INC. OBJECTIONS TO DIRECT CASE  
 EXHIBITS AND TESTIMONY**

1. Pursuant to the *Prehearing Order*, FCC 17M-28,<sup>1</sup> Lake Broadcasting Inc. (Lake) filed its objections to the Enforcement Bureau's (Bureau) direct case exhibits and written direct testimony on April 21, 2017.<sup>2</sup> Therein, Lake objects to the admission of certain submissions in the Bureau's direct case, arguing: (i) that the Bureau's Direct Case Exhibit No. 4 – the business records of the Missouri Department of Corrections – and certain written direct testimony based on and related to those records offered by the Bureau's expert witnesses – should be excluded on hearsay grounds;<sup>3</sup> (ii) that certain training courses the Bureau's witness, Ms. Tammy Gremminger, included as part of her written direct testimony, and which

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<sup>1</sup> See *Prehearing Order*, FCC 17M-28 (ALJ, rel. Feb. 28, 2017) (*Prehearing Order*).

<sup>2</sup> See Lake Broadcasting Inc.'s Objections to Direct Case Exhibits and Written Direct Testimony of Enforcement Bureau, filed April 21, 2017 (Objections).

<sup>3</sup> See, e.g., Objections at 2-4 seeking to exclude portions of the Bureau's Direct Case Exhibit No. 1 (Testimony of Dr. Kimberly Weitzl), the Bureau's Direct Case Exhibit No. 2 (Testimony of Tammy Gremminger), and the Bureau's Direct Case Exhibit No. 3 (Statement of Tammy Gremminger) and the entirety of the Bureau's Direct Case Exhibit No. 4.

demonstrate her expertise and qualifications, should be excluded on relevance grounds;<sup>4</sup> and (iii) that certain language in Ms. Gremminger's written direct testimony is inconsistent with the Hearing Designation Order (HDO).<sup>5</sup> As set forth in greater detail below, Lake's objections are baseless and should be denied.

**A. The Bureau's Direct Case Exhibit No. 4 – the Missouri Department of Corrections Records – Is Admissible Under the Federal Rules of Evidence**

2. Lake contends that "certain paragraphs in EB Exhibit 1 (Testimony of Kimberly Weitzl), EB Exhibit 2 (Testimony of Tammy Gremminger), EB Exhibit 3 (Statement of Tammy Gremminger) and the entirety of EB Exhibit 4 (Business Records of the Missouri Department of Corrections)" should be excluded as "inadmissible hearsay statements."<sup>6</sup> Lake argues that the records from the Missouri Department of Corrections contained in the Bureau's Direct Case Exhibit No. 4, and any testimony based thereon, should be excluded because these records are "only admissible as a part of business records of the [Missouri] Department [of Corrections] and NOT to prove the truth of the facts asserted therein."<sup>7</sup> As explained in more detail below, the Missouri Department of Corrections records, and the testimony related thereto, are admissible under the Federal Rules of Evidence, regardless of whether they would otherwise be considered hearsay.<sup>8</sup> As hearsay is the only basis upon which Lake objects to the introduction of this evidence, the Bureau respectfully submits that it should be admitted.

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<sup>4</sup> See *id.* at 3.

<sup>5</sup> See *id.*

<sup>6</sup> See Objections at 2-4.

<sup>7</sup> *Id.* at 2 (emphasis in original). Lake lists a series of records and lines of testimony it finds objectionable on hearsay grounds. *Id.* at 2-4.

<sup>8</sup> The Commission's rules provide that "the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings." 47 CFR § 1.351.

**1. The Bureau's Written Direct Testimony Based on the Missouri Department of Corrections Records Is Admissible Under Rule 703 of the Federal Rules of Evidence**

3. Pursuant to Rule 703 of the Federal Rules of Evidence, “the facts or data [upon which an expert bases an opinion or inference] need not be admissible in evidence in order for the opinion or inference to be admitted,”<sup>9</sup> as long as the facts and/or data are “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”<sup>10</sup> Thus, even if the Presiding Judge were to conclude that the Missouri Department of Corrections records are not admissible, the Bureau's expert opinions and/or inferences based upon the facts or data contained in those records, would be admissible as long as these records are the type reasonably relied upon by experts in forming the type of opinion rendered by the Bureau's experts.<sup>11</sup>

4. Here, Lake does not contest that the Missouri Department of Corrections documents are the type that are reasonably relied upon by experts in determining whether a sex offender poses a risk to reoffend. Moreover, Ms. Gremminger offers testimony – which Lake does not object to – demonstrating that, in assessing the risk posed by sex offenders, she usually considers the very types of facts and data found in the Missouri Department of Corrections records, such as the sexual offenses that occurred, any justification(s) offered for the offender's actions, the offender's denial or acceptance of responsibility for his/her actions, the official police report, and the offender's participation in sex offender treatment.<sup>12</sup>

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<sup>9</sup> Fed. R. Evid. 703.

<sup>10</sup> *Id.*

<sup>11</sup> See *Wilson By and Through Wilson v. Merrell Dow Pharmaceuticals, Inc.*, 893 F.2d 1149, 1153 (10<sup>th</sup> Cir. 1990) (allowing an expert to reveal the basis of his testimony during direct examination, even if the basis is hearsay, provided that the facts or data underlying his conclusions are of a type reasonably relied upon by others in his field of expertise). Notably, the cases cited by Lake also stand for this proposition. See *Objections at 2* (citing *U.S. v. Lundy*, 809 F.2d 392, 395 (7<sup>th</sup> Cir. 1987); *Paddack v. Dave Christensen Inc.*, 745 F.2d 1254, 1262 (9<sup>th</sup> Cir. 1984).

<sup>12</sup> See EB Direct Case Exhibit No. 2 at ¶ 6.

5. Thus, pursuant to Rule 703 of the Federal Rules of Evidence, the portions of the Bureau's Direct Case Exhibits Nos. 1, 2, and 3 that Lake seeks to exclude solely on the basis that those portions of Dr. Weitzl and Tammy Gremminger's opinions were based on allegedly inadmissible documents, should be admissible.

**2. The Missouri Department of Corrections Records – And the Direct Testimony Based Thereon - Are Admissible Under Exceptions to the Hearsay Rule**

6. Pursuant to Rule 803 of the Federal Rules of Evidence, the Missouri Department of Corrections records should not be excluded under the hearsay rule. Indeed, these records fall within two exceptions: Rule 803(4), which allows "statements made for purposes of medical diagnosis or treatment," and Rule 803(8), which allows "records, reports, statements, or data compilations, in any form, of public offices or agencies."<sup>13</sup>

7. ***Federal Rule of Evidence 803(4).*** Pursuant to Rule 803(4) of the Federal Rules of Evidence, "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms...or the inception or general character of the cause of or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are not excluded as hearsay.<sup>14</sup> Rule 803(4) is not limited to use by treating physicians. Rather, courts have applied the rule to experts consulted for purposes of trial testimony, explaining that Rule 803(4) has "abolished the [common-law] distinction between the doctor who is consulted for purposes of treatment and an examination for the purpose of diagnosis only: the latter usually refers to a doctor who is consulted only for the purpose of testifying as a witness."<sup>15</sup>

8. Here, the Bureau's expert psychologist, Dr. Weitzl, relied on the Missouri

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<sup>13</sup> See Fed. R. Evid. 803(4) and 803(8).

<sup>14</sup> See Fed. R. Evid. 803(4).

<sup>15</sup> *Farley*, 992 F.2d at 1125.

Department of Corrections records for the purpose of rendering her medical diagnosis of Michael Rice, Lake's president, director and sole shareholder, and a convicted felon who previously held radio station authorizations that were revoked on the basis of Rice's felony convictions and misrepresentation to, and lack of candor before, the Commission.<sup>16</sup>

Specifically, Dr. Weitzl reviewed the Missouri Department of Corrections records and information contained therein concerning Rice's medical history, his past and present psychological symptoms, and his prior treatment (including his participation in sex offender treatment), in order to diagnose Rice and to assess his psychological health as it pertains to the question of his rehabilitation. Based in large part on the statements and information contained in these records, Dr. Weitzl concluded that Rice suffers from at least four mental disorders – Pedophilia, Hebephilia, Narcissistic Personality Disorder, and Alcohol Abuse Disorder – each of which increases the likelihood that Rice will continue to experience sexually deviant urges and reoffend.<sup>17</sup>

9. Under Federal Rule of Evidence 803(4), therefore, both the statements upon which Dr. Weitzl's diagnosis is based (the Missouri Department of Corrections records), and her direct testimony concerning those statements, are admissible as an exception to the hearsay rule.<sup>18</sup>

10. ***Federal Rule of Evidence 803(8).*** Rule 803(8) of the Federal Rules of Evidence creates an additional hearsay exception that applies to the Missouri Department of Corrections records and the Bureau's direct testimony based thereon. Specifically, this rule

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<sup>16</sup> See EB Official Notice Exhibits 14-16 (*Contemporary Media, Inc.*, Initial Decision, 12 FCC Rcd 14254 (ALJ 1997); *Contemporary Media, Inc.*, Decision, 13 FCC Rcd 14437 (1998), *recon. denied*, Order, 14 FCC Rcd 8790 (1999), *aff'd sub nom*, *Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 920 (2001)).

<sup>17</sup> See Weitzl at ¶¶ 35-44.

<sup>18</sup> *Farley*, 992 F.2d at 1125.

provides that “reports, statements, or data compilations, in any form, of public offices or agencies, setting forth...the activities of the office or agency”<sup>19</sup> are not excluded by the hearsay rule. This exception to the hearsay rule “is based upon the principles that public documents prepared in the discharge of official functions are presumed trustworthy, and the necessity of using such documents is due to the likelihood that a public official would have no independent memory of a particular action or entry where his duties require the constant repetition of routine tasks.”<sup>20</sup> Moreover, “[o]pinions and conclusions, as well as facts, are covered by [this Rule],”<sup>21</sup> and the Supreme Court has adopted a broad interpretation of its applicability.<sup>22</sup> The Commission has recognized that this rule applies in Commission proceedings, holding that the records of government agencies are fully admissible as an exception to the hearsay rule, citing Federal Rule of Evidence 803(8).<sup>23</sup>

11. The Bureau submits that the Missouri Department of Corrections records in question are “public records” within the meaning of Rule 803(8). The Bureau’s witness, Ms. Gremminger, is a licensed Parole Officer working in the Missouri Department of Corrections and has authenticated these records as those that are maintained by the Missouri Department of Corrections and kept by Probation and Parole Officers employed by the Department in the ordinary course of business. As she has explained in her declaration, these documents are part of the official records of the office which supervises inmates during probation and parole and were generated in the regular course of business by “employees and representatives of the

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<sup>19</sup> See Fed. R. Evid. Rule 803(8).

<sup>20</sup> See *United States v. Becerra-Valadez*, 448 Fed. Appx. 457, 461 (5th Cir. 2011).

<sup>21</sup> See *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1305 (5th Cir. 1991).

<sup>22</sup> See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169-70 (1988).

<sup>23</sup> See, e.g., *Nancy Naleszkiewicz*, Memorandum Opinion and Order, 10 FCC Rcd 1083, Appendix n.18 (1995) (government records admissible in FCC proceeding under Federal Rule of Evidence 803(8)); see also *Mr. Tylor Stone et al.*, Letter Decision, 30 FCC Rcd 14367, 14374 note 39 (MB 2015) (records of government investigation admissible pursuant to exception to the hearsay rule).

Missouri Department of Corrections with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make a record or to transmit the information thereof created these records at the time or reasonably soon thereafter.”<sup>24</sup> Indeed, courts have frequently recognized that probation and parole records fall within the hearsay exception set forth in Rule 803(8).<sup>25</sup>

12. Because the Missouri Department of Corrections records qualify as “public records” within the meaning of Rule 803(8), they are presumed to be admissible unless the party opposing admission proves the records’ untrustworthiness.<sup>26</sup> Lake has not alleged that the records in question are untrustworthy. Instead, Lake’s objections are based solely on its erroneous contention that “the only reason that the Bureau is proffering” the records in question “is to taint the hearing record with scurrilous hearsay statements and reports about Mr. Rice.”<sup>27</sup> To the contrary, however, the Bureau seeks to introduce these records in order to aid the Presiding Judge in evaluating local law enforcement’s positions on whether Rice remains a continuing risk to the community.<sup>28</sup> There is no basis therefore for the Presiding Judge to exclude these records from the hearing.

**B. The Presiding Judge Has the Discretion to Allow the Missouri Department of Corrections Records – And Any Testimony Based thereon – Into Evidence**

13. Pursuant to Section 1.351 of the Commission’s rules, the Presiding Judge has the discretion to “relax” the application of the Federal Rules of Evidence if the “ends of justice

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<sup>24</sup> *Id.*

<sup>25</sup> See, e.g., *U.S. v. Harris*, 557 F. 3d 938, 942 (8<sup>th</sup> Cir. 2009) (finding parole records admissible in a criminal proceeding under Federal Rule of Evidence 803, notwithstanding the provision in subsection (B) limiting the use of this exception in certain criminal cases).

<sup>26</sup> See *Moss*, 933 F.2d at 1305.

<sup>27</sup> See Objections at 2.

<sup>28</sup> See *In the Matter of David Titus Amateur Radio Operator and Licensee of Amateur Radio Station KB7ILD*, Decision, 29 FCC Rcd 14066, 14073-74 (2014) (requiring appropriate deference to be given to the judgment of local authorities whether a convicted sex offender poses a high risk to the safety of the community).

require.”<sup>29</sup> In this case, the records of the Missouri Department of Corrections – and the Bureau’s expert opinions based thereon – are highly probative of the issues concerning Rice’s alleged rehabilitation and whether he continues to pose a high risk of re-offending. Accordingly, to the extent the Presiding Judge does not otherwise conclude that the Missouri Department of Corrections records, and those portions of Dr. Weitl and Ms. Gremminger’s testimony based on those records, are admissible pursuant to the Federal Rules of Evidence, the Bureau respectfully submits that he should exercise his discretion to allow them into evidence at hearing.

**C. Lake’s Objections to The Courses Identified in Ms. Gremminger’s Direct Testimony Should be Rejected**

14. In its Objections, Lake seeks to exclude the names of 18 courses that Ms. Gremminger identifies in her direct testimony. Lake suggests – without any further explanation or basis – that “the 18 courses in the list of trainings that are crossed out do not *appear* to have any relevance to risk assessment training.”<sup>30</sup> While the relevance of these courses to Ms. Gremminger’s expertise may not be evident from the title, to the extent that Lake questions these courses’ applicability to her specialized knowledge as a Sex Offender Specialist with the Missouri Department of Corrections, the more appropriate action would be to question her about them during her *voir dire*, and not to simply exclude the titles without additional information. Moreover, in determining Ms. Gremminger’s “knowledge, skill, experience, training, or education,” the Presiding Judge must be able assess the totality of the expert’s background, and the training courses that Lake now seeks to exclude simply add to the Presiding Judge’s ability to do so.<sup>31</sup> Accordingly, this objection should also be denied.

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<sup>29</sup> See 47 C.F.R. § 1.351.

<sup>30</sup> See Objections at 3 (emphasis added).

<sup>31</sup> See *Washington v. Kellwood Co.*, 105 Fed. Supp. 3<sup>rd</sup> 293, 304 (2015) (the court must examine the totality of the witness’s background to determine whether he or she exhibits any one or more of the qualifications listed in Rule 702 – knowledge, skill, experience, training, or education – with respect to a relevant field).



**D. The Information in Ms. Gremminger's Direct Testimony is Consistent with the Language of the HDO**

15. Lastly, Lake objects to paragraph 9 of the Bureau's Direct Case Exhibit No. 2 – Ms. Gremminger's Direct Testimony – in which she refers to the ages of the victims of sex crimes for which Rice was convicted as being between the ages of "9-14."<sup>32</sup> Lake claims that this statement contradicts the HDO "which recites that Mr. Rice's crimes involved 'children who were between 14 and 16 years old' and other children 'who were under 14 years old.'"<sup>33</sup> Obviously, the phrase in the HDO regarding "children who were under 14 years old" could reasonably include children between the ages of 9 and 14.<sup>34</sup> Thus, Ms. Gremminger testimony does not contradict the HDO. Rather, it serves to clarify the specific ages of the children "under 14 years old" referenced in the HDO. This objection therefore is baseless and should be denied.

**E. Conclusion**

16. For the foregoing reasons, the Bureau respectfully requests that Lake's Objections to certain paragraphs in EB Exhibit 1 (Testimony of Kimberly Weitzl), EB Exhibit 2 (Testimony of Tammy Gremminger), EB Exhibit 3 (Statement of Tammy Gremminger) and to the entirety of EB Exhibit 4 (Business Records of the Missouri Department of Corrections) be denied.

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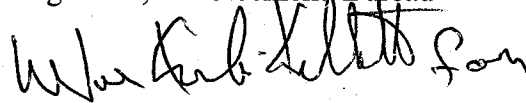
<sup>32</sup> See Objections at 3.

<sup>33</sup> *Id.*

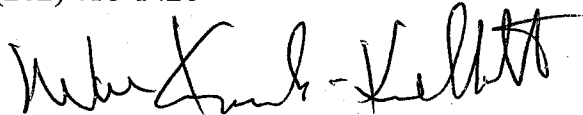
<sup>34</sup> HDO, 29 FCC Red at 5430.

Respectfully submitted,

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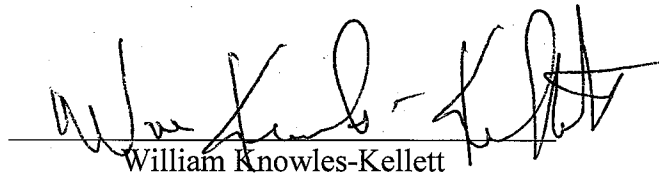
**CERTIFICATE OF SERVICE**

I, William Knowles-Kellett, counsel for the Enforcement Bureau's Investigations & Hearings Division, certify that on this 26<sup>st</sup> day of April 2017, I caused to be sent via email copies of the foregoing Enforcement Bureau Response to Lake Broadcasting Inc. Opposition to Direct Case Exhibits and Testimony to:

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And to:

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